Supreme Court, U.S.
FILED

95 383 SEP 8 1995

No OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

MARK LEVEY BY THE PERSONAL REPRESENTATIVE OF HIS ESTATE and ALMA AND FRANK LEVEY, PARENTS OF MARK LEVEY, DECEASED,

Petitioner,

vs.

STATE DEVELOPMENTAL CENTER, GRAFTON, NORTH DAKOTA,

Respondent.

On Petition For Writ Of Certiorari To The North Dakota Supreme Court

PETITION FOR WRIT OF CERTIORARI

IRVIN B. NODLAND
IRVIN B. NODLAND, P.C.
Attorney for Petitioner
P. O. Box 640
Bismarck, ND 58502-0640
701-222-3030

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

52 pp

QUESTION PRESENTED FOR REVIEW:

Does North Dakota's prospective abrogation of sovereign immunity for some but not for all violate the Equal Protection and Privilege's Immunities Clauses of the Fourteenth Amendment to the Constitution of the United States and the Due Process Clause of the Fifth and Fourteenth Amendments?

PARTIES TO THE PROCEEDING:

The parties to these proceedings include Mark Levey by the Personal Representative of his Estate and Alma and Frank Levey, Parents of Mark Levey, Deceased, Petitioners, and the State Developmental Center, Grafton, North Dakota, Respondent.

TABLE OF CONTENTS

		Page
A.	Question Presented For Review	i
B.	Parties To The Proceeding	ii
C.	Table of Contents	iii
D.	Table of Authorities	iv
E.	Official Reports of Opinions Relevant to This Petition	1
F.	Jurisdictional Grounds	1
G.	The Constitutional Provisions Involved in This Case Include	2
H.	Statement of The Case	2
I.	Statement of the Facts	3
J.	Argument in Support of Petition	8
K.	Conclusion	13

TABLE OF AUTHORITIES

Page

CASES

Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632 (N.D. 1994).....7, 12

Burr v. Kulas, Case No. 94-0345, N.D.S.Ct., 6/1/95 ___ N.W.2d ___ (1995).....1, 8

Fargo Interstate Bank v. Larson 475 N.W.2d 538 (N.D. 1991).....10, 11

Ferris v. North Dakota Centennial Commission, 521 N.W.2d 643 (N.D. 1994)..... 7

Great Northern Railway Co. v. Sunburst Oil and Refining Co., 387 U.S. 358 (1932)..... 9

Griffin v. Kentucky, 479 U.S. 314, 107 S.Ct. 108, 93 L.Ed.2d 649 (1971).....9, 10

Harper v. Virginia Dept. of Taxation, ___ U.S. ___, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993)..... 9

Hosman v. North Dakota State University, 521 N.W.2d 643 (N.D. 1994)..... 7

James B. Beam Distributing Company v. Georgia, et al., 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991).....9, 10

Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974)..... 13

UNITED STATES CONSTITUTION

United States Constitution, Fifth Amendment... 2, 8, 10

United States Constitution, Fourteenth Amendment.....2, 8, 10, 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

28 USC 1257 1

Rule 12 of U.S. S.Ct. 1

OFFICIAL REPORTS OF OPINIONS RELEVANT TO THIS PETITION:

a. Original decision of the Honorable District Judge Lee A. Christofferson, Northeast Judicial District of North Dakota, dated June 11, 1993. (Unreported)

b. Original decision of the Honorable District Judge Lee A. Christofferson, Northeast Judicial District of North Dakota, dated December 6, 1994. (Unreported)

c. Order Granting Supervisory Writ of the North Dakota Supreme Court, dated January 19, 1995. (Unreported)

d. Judgment (of Dismissal) by the Honorable District Judge Lee A. Christofferson, Northeast Judicial District of North Dakota, dated January 30, 1995. (Unreported)

e. Opinion on Appeal of the North Dakota Supreme Court, dated June 27, 1995. (Reported)

f. *Burr v. Kulas & Lemon,* Opinion on Appeal of the North Dakota Supreme Court, dated June 1, 1995. (Reported)

JURISDICTIONAL GROUNDS:

The Jurisdiction of the United States Supreme Court is provided by 28 USC 1257 and Rule 12 of U.S. S.Ct.

THE CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE INCLUDE:

a. *Fifth Amendment*:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

b. *Fourteenth Amendment*:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE:

In September of 1994, the North Dakota Supreme Court abrogated sovereign immunity. Immunity for the State had been imposed by judicial decree nearly a century ago, and it was abrogated by judicial decree in 1994.

Abrogation was announced simultaneously in three cases. As to those three cases, the North Dakota Supreme Court decreed the plaintiffs would be allowed to proceed to trial upon remand, and the State would enjoy no sovereign immunity.

As to some 21 other cases then pending in the judicial pipeline of the State's trial courts (including this one), the Court said the State would continue to enjoy immunity. The scheme announced was that for all others than the three plaintiffs then before it abrogation would take place prospectively so as to apply only to causes of action arising 15 days after the 1995 State Legislative Session had adjourned. That date arrived – April 21, 1995.

This litigant challenges the power of the North Dakota Supreme Court to abrogate sovereign immunity as a defense for three tort litigants whose causes of action originated prior to April 21, 1995 at the same time as it denies equal treatment to at least 21 other litigants identically situated.

STATEMENT OF THE FACTS:

Mark Levey was born November 7, 1954 and died on Christmas Day of 1989. He was 35 years old when he died. When he was five his parents, Frank and Alma Levey were advised Mark had progressed only to the mental development of a two year old and that he was not eligible to enter into the State's public school system.

They were further advised they *must* commit him to the State Developmental Center at Grafton because that

was the only educational facility in the state capable of furthering his *compulsory* education. His parents were opposed to the commitment but yielded to the requirements of the law. At age six Mark was taken from them and institutionalized until he died 29 years later.

On December 9, 1989 Alma Levey received a telephone call from someone identifying himself as a doctor to whom Mark had been presented for care. He requested Alma's permission as guardian to perform exploratory surgery on Mark. He advised Mark may have suffered a ruptured appendix. Alma gave her verbal consent. Later that day she received a telephone call from someone identifying herself as a surgical nurse. The tone of the call was hysterical. Alma was advised surgery had revealed Mark was suffering from a severed intestine and that it appeared the cause was that he had been beaten or kicked. Later she received a call from the surgeon. He advised Alma her son was doing fine.

Alma and her husband were farmers of modest means who lived 200 miles from the hospital. Between December 10 and December 16, 1989, Alma called the hospital daily to check on Mark's condition. She was advised he was doing fine. On December 16, however, she received another call from a nurse again seeking her permission to again perform surgery on Mark. Permission was given and Alma immediately departed for the hospital to be with her son. When she arrived at the hospital in the early morning hours of December 17, 1989 Mark appeared to be extremely ill but he recognized his mother and called her "Mama".

Alma stayed by her son's side until December 21, 1989 when his condition had so deteriorated that she demanded he be flown by air ambulance 100 miles to a Fargo, North Dakota hospital. For a few days it appeared he might be improving but on Christmas Day 1989 he took a turn for the worse and died. The causes of his death were the complications (septic poisoning) that developed from discharges into his abdominal cavity while his intestine was severed.

If the Leveys are ever given their day in court they will prove there was a long history of physical abuse toward Mark while he was entrusted to the care of the State operated Developmental Center. A video tape taken of Mark just a few weeks before his death will show he was severely physically abused. There will be evidence from an eye witness and her report to the State Protection and Advocacy Department that Mark was kicked in the lower abdomen by a staff person at approximately 4:50 p.m. on the afternoon of November 30, 1989. There will be testimony from former employees of the institution that reports of abuse to patients made to supervisors went unheeded. There will be testimony from an employee that Mark suffered far too long as he laid on the floor holding his stomach before he was taken to a hospital prior to his death.

One witness, Mike Otto, will characterize himself as a "behavior stopper". When a patient "acted out", he and three others would "dog pile" onto him or her even if the behavior was a reaction to something a staff person had done. He will testify that many of the residents of the Center were beaten severely by caretakers while he was there. He will swear under oath that caretakers would

wrap their fists in towels so that there would be no marks left on the residents' bodies. He will swear that he personally witnessed Mark Levey being beaten in this fashion on many occasions. He will testify that he would report these incidents but would be challenged by his supervisors, who would claim the report to be untrue and would demand that the incident be deleted from the written reports. He would report that staff persons who tried to object or protest were transferred to other units. He will state he personally was so transferred for the express reason he had made numerous complaints about abuse of the residents. He would relate other specific instances of outrageous abuse and cruelty to patients that he personally witnessed, including abuse to Mark Levey.

If the Leveys are ever given their day in court, they will establish that an institution of this type owes a fiduciary responsibility to an incompetent and helpless patient such as Mark, and that it was duty bound to establish procedures that would protect him from injury by staff, other patients and himself. The culpability of the State and its agents in this case lies somewhere between manslaughter at the one end and gross negligence at the other.

After this plaintiff sued the State of North Dakota, the State filed motions for summary judgment raising as a defense a claim that the State was absolutely immune from suit.

In response this plaintiff submitted a challenge to sovereign immunity as an outdated doctrine based on medieval notions "the King can do no wrong" which serves no useful purpose in a modern society. The trial

court *agreed* and declared sovereign immunity could not be raised as a defense by the State in this case. The matter was ordered to trial.

In September 1994, while this case was awaiting trial, the North Dakota Supreme Court issued three simultaneous opinions judicially abrogating sovereign immunity prospectively.[1] The decision of prospectively declared that abrogation of immunity would take effect 15 days after the 1995 State Legislative Session adjourned. The effective date of abrogation was April 21, 1995.

At the same time as it announced a prospective date for abrogation for all other causes of action, the North Dakota Supreme Court provided that the three plaintiff's cases in which the abrogation was being announced would be remanded to their respective trial courts for trial. At that time some 21 other plaintiffs had tort cases pending against the State of North Dakota in the trial courts of North Dakota. After the September 1994 announcement of prospective abrogation, most efforts to proceed to trial on the part of the other 21 plaintiffs were met with dismissals by trial judges who believed the State Supreme Court's scheme of prospective abrogation required dismissal. In two cases (including this one) the trial judges still refused to dismiss and, consequently, upon application by the State, Supervisory Writs were issued by the State's Supreme Court to these two trial

---

[1] *Bulman v. Hulstrand Constr. Co.*, Supreme Court No. 940047; *Ferris v. North Dakota Centennial Commission*, 521 N.W.2d 643 (N.D. 1994); and *Hosman v. North Dakota State University*, 521 N.W.2d 643 (N.D. 1994).

judges who had refused to dismiss even after the Supreme Court's prospective ruling.

During the Supervisory Writ process in this case, a full Constitutional challenge to the North Dakota Supreme Court's scheme for *partial* prospectivity was made by this plaintiff in the trial court. The Constitutional challenge was subsequently pursued to the North Dakota Supreme Court. On June 27, 1995, the North Dakota Supreme Court issued an opinion upholding the dismissal of this case on grounds of sovereign immunity and denying this plaintiff's Equal Protection Constitutional challenge. The issue raised on appeal (which is here presented) is not disclosed as to rationale in this North Dakota Supreme Court decision. The Court simply stated this same issue had been recently considered and rejected in a case entitled *Burr v. Kulas*, No. 94-0345, N.D.S.Ct., 6/1/95, ___ N.W.2d ___. (Appendix 6)

ARGUMENT IN SUPPORT OF PETITION:

Does North Dakota's prospective abrogation of sovereign immunity for some but not for all violate the Equal Protection and Privilege's Immunities Clauses of the Fourteenth Amendment to the Constitution of the United States and the Due Process Clause of the Fifth and Fourteenth Amendments?

A scheme of prospective application of law that selectively grants access to the Courts to some tort litigants and not to all other similarly situated cannot pass muster under the Due Process Clause of the Fifth Amendment or the Equal Protection, Due Process and Privileged

Immunities Clauses of the 14th Amendment to the Constitution of the United States of America.

In *Harper v. Virginia Dept. of Taxation*, 410 S.E.2d 868 (Va.), S.Ct. 2510, 125 L.Ed.2d 74 (1993), the U.S. Supreme Court held that when a Court decides a case and applies a new legal rule of that case to the parties before it, then it and other courts must treat that same new legal rule as "retroactive", applying to all pending cases whether or not those cases involved predecision events.

The idea that successful litigants may be rewarded for zealous advocacy by giving them, and only them, immediate enjoyment of a judicial change in the law had its origin in *Great Northern Railway Company v. Sunburst Oil & Refining Company*, 387 U.S. 358 (1932). This idea became known as the "Sunburst" doctrine. Forty years later, however, in *Griffin v. Kentucky*, 479 U.S. 314, 107 S.Ct. 108, 93 L.Ed.2d 649, the U.S. Supreme Court found such an extension of rights to some and not to all in criminal cases violated the Equal Protection Clause of the U.S. Constitution. Twenty years after *Griffin* in *James B. Beam Distributing Company v. Georgia, et al.*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481, the U.S. Supreme Court held such disparate treatment was impermissible in civil cases as well. Plaintiff here submits both *Griffin* and *James Beam*, supra, are grounded in the equality provisions of the U.S. Constitution and are as applicable to exercises of power by the state courts as exercises of power by the federal courts.

James Beam, supra, however, is being interpreted by the North Dakota Supreme Court as an exercise of an administrative or supervisory function of the U.S.

Supreme Court, wherein it was only supervising the federal courts with no applicability of that decision to what a State Supreme Court may or may not do. Consequently, the North Dakota Supreme Court has felt free even after *Griffin* and *James Beam*, supra, to continue to grant or withhold new rights, privileges or immunities as may flow from reversals of prior precedent. Accordingly, it has decreed from time to time, that the changes in the law it is announcing will become effective sometimes immediately, sometimes retroactively, sometimes prospectively, sometimes partially prospective or partially retroactive, as it sees fit in the circumstance. Most importantly for this case, in the process of doing so it extends disparate treatment and different privileges and immunities to similarly situated citizens and litigants.

As an example of arbitrary exercise of this power to give or withhold *partial* prospectivity where there was no Fifth or Fourteenth Amendment scrutiny, in *Fargo Interstate Bank v. Larson*, 475 N.W.2d 538 (N.D. 1991), the North Dakota Supreme Court reversed established judicial precedent and declared guarantors of real estate loans no longer will be liable for deficiency judgments upon foreclosure under North Dakota's anti-deficiency statute. But in doing so it made its reversal of established precedent *totally* prospective and refused to grant relief from liability for a deficiency even to the plaintiffs who had brought the matter to the Court's attention. The Court said its refusal to grant relief even to the plaintiffs then before it was based upon a concern that lending institutions in the state who had relied for many years upon personal guarantees would be unsettled if they had no advance notice that henceforth the State's anti-deficiency statute would be interpreted to deny collection rights

against personal guarantors where there was a monetary deficiency after the foreclosure sale.

The Court in *Fargo Interstate Bank*, supra, chose not to reward the zealous advocacy of the plaintiffs even though they had succeeded in causing a change in the law for everyone in the future. If the Court in *Fargo Interstate Bank* had followed the course of action it followed in the present case, it would have rewarded that successful plaintiff with immunity from the deficiency the bank was pursuing and would have made the decision prospective for all others.

The stability of the banking industry in North Dakota would not have been at stake. One large bank would have lost a part of one relatively small loan in one instance. These two cases point out the arbitrariness of actual application of the "Sunburst doctrine" that gets injected if "equal protection" rights of citizens are overlooked.

There is no longer a "Sunburst" exception to the Equal Protection Clause of the Fourteenth Amendment in civil cases, as there was from 1931 to 1991. The concept of partial prospectivity has been abandoned by the U.S. Supreme Court because it denies equal rights to citizens who are similarly situated.

The Equal Protection Clause of the U.S. Constitution is specifically intended to prevent arbitrary and disparate treatment of similarly situated citizens. The arbitrariness of the judicial power being exercised by the North Dakota Supreme Court in the implementation of its decisions through partial prospectivity is well demonstrated by the facts of *this* case. This litigant challenged the doctrine of

sovereign immunity when it was first raised in the trial court. This litigant succeeded in convincing the trial judge that sovereign immunity was an outdated, outmoded, antiquated judicial doctrine that had no place in our state's tort system. Consequently this case proceeded to trial. Others like *Bulman*, supra, failed to convince their trial judge that sovereign immunity should be abrogated. Consequently their cases were dismissed, and they were able to proceed immediately to appeal. Upon appeal they were successful in convincing the North Dakota Supreme Court of a legal position for which this litigant had already been successful at the trial level. By being first to be successful at the trial level, this litigant had no basis for proceeding to the Supreme Court. Had this litigant lost at the trial level, this litigant's appeal to the North Dakota Supreme Court would have arrived at the North Dakota Supreme Court months ahead of those three whose cases now stand for abrogation of sovereign immunity in North Dakota. Magnifying the arbitrariness of all of this is the fact that in making their presentation to the North Dakota Supreme Court, the three successful litigants borrowed heavily from the research and work of this litigant and others who had also been successful at the trial level. This was the research and arguments that had proved successful at the trial court level to a point that appeal to the North Dakota Supreme Court was not only unnecessary but precluded.

The rationale extended by the North Dakota Supreme Court for making its abrogation of sovereign immunity prospective was that it wished to give the 1995 Legislative Session an opportunity to make financial preparations that would arise as a result of new exposures if

immunity was no longer to provide a shield from tort liability. That issue should not be allowed to cloud matters in this petition. The issue here is not whether the North Dakota Supreme Court may change the law and then make the change prospective. The issue here is whether it may change the law and then grant rights and privileges that flow from that change to some but not to all others similarly situated.

The "preparation" issue is further clouded in this case because the North Dakota Supreme Court had previously held purchase of liability insurance constitutes a waiver of immunity. See, e.g., *Kitto v. Minot Park Dist.*, 224 N.W.2d 795 (N.D. 1974). This litigant claims there *was* insurance in place at the time of Mark Levey's death that should have been applicable to his death and that purchase of that policy should have been found as a waiver of sovereign immunity. Although the petitioner in this case has strong feelings, there was an applicable insurance policy in place at the time of Mark Levey's death, that issue is abandoned here so that this case may be decided simply, squarely and clearly upon the issue of whether the State of North Dakota may allow some litigants to proceed to trial against the State with the State having no sovereign immunity while others identically situated may not.

CONCLUSION:

These petitioners should be allowed to go forward in trial to establish that Mark Levey was killed as a result of the gross negligence of the State of North Dakota and its

agents, and that the State should have to respond in money damages for his wrongful death.

Respectfully submitted this 7th day of September, 1995.

IRVIN B. NODLAND
IRVIN B. NODLAND, P.C.
Attorney for Petitioner
P. O. Box 640
Bismarck, ND 58502-0640
701-222-3030

APPENDIX 1

STATE OF NORTH DAKOTA IN DISTRICT COURT
COUNTY OF RAMSEY NORTHEAST JUDICIAL DISTRICT

Mark Levey by the Personal Representative of his Estate and Alma and Frank Levey, Parents of Mark Levey, deceased,	)	Civil No. 13821
Plaintiffs,	)	
v.	)	
State Developmental Center, Grafton, North Dakota,	)	**ORDER**
Defendant.	)	

Defendant State Developmental Center moves to dismiss this action based upon the doctrine of sovereign immunity, lack of North Dakota Insurance Reserve Fund (NDRIF) coverage for the claims asserted and even if coverage somehow existed, such coverage would not waive the defense of sovereign immunity by the State.

Plaintiff argues that the court should declare the longstanding doctrine of sovereign immunity unconstitutional despite recent supreme court cases which have rejected this challenge. After the court gave the plaintiff some additional discovery time, plaintiff additionally asserted insurance coverage under an NDIRF policy and therefore, waiver of the defense of sovereign immunity by such coverage.

After review of the briefs and supporting documents submitted by the parties, this court concludes as a matter of law that there was no NDIRF coverage for the State

Developmental Center in December, 1989 which is the time and place the alleged negligent acts occurred. Despite plaintiffs' assertion, it is undisputable that the coverage began on January 1, 1990 for the State Development Center. Accordingly, with no NDIRF coverage, the issue of sovereign immunity being waived by such coverage is moot.

The remaining issue is whether the constitutional mandate of the doctrine of sovereign immunity should be preserved. Several North Dakota cases have upheld the doctrine albeit by a three to two decision. Some states have abandoned the doctrine either by legislative mandate or judicial abolishment. However, a minority of states still maintained the doctrine. In North Dakota, the majority of trial court judges continue to uphold the doctrine as being constitutional. So now after ten years of supreme court deference to the North Dakota legislature, our state still has not abandoned the doctrine mandate. Based on this history, it appears that if the doctrine of sovereign immunity is to be abandoned, it will need to be done by judicial intervention.

The framers of our state constitution, while recognizing this principle, relaxed the rigid rule somewhat and left the extent of any modification to be largely determined by the legislature. In North Dakota, the doctrine is found in Section 9 Article I of the North Dakota Constitution.

> "Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct."

In an early case, *State ex rel. Schafer v. Lowe*, 210 N.W. 501, 503 (1926), the court set forth the rationale for the doctrine of sovereign immunity.

> "The doctrine rests upon reasons of public policy – the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered and public safety endangered, if the supreme authority could be subjected to a suit at the instance of every citizen, and subsequently controlled in the use and disposition of the means required for the proper administration of the government."
>
> At 503.

This language succinctly states the original rationale for the doctrine which was labeled inassailable at that time. Since then, North Dakota courts have repetitively maintained that the power to modify or waive the state's immunity from suit is vested exclusively in the legislature.

But does the above-stated rationale have a valid basis in our present society especially when one considers the changes in negligence law since statehood or is it merely a hollow doctrine maintained by stare decisis? Perhaps more germane here is how long should courts defer to the legislature to make modifications if they are deemed necessary now? If this court were to agree with the plaintiffs' argument that the doctrine of sovereign immunity should be abolished by judicial intervention, then the litany of cases upholding the doctrine must be set aside.

Stare decisis is a respected policy of courts to stand by precedent and not to disturb a settled point. *Black's*

Law Dictionary 5th Ed. Arguably, the doctrine of sovereign immunity is not as well-settled as Defendant suggests based upon the frequent and consistent attack in North Dakota courts and other states. Many states have abolished the doctrine in the past few years. Recently, an Illinois court observed that the doctrine of stare decisis does not mandate the sanctification of ancient fallacies or decree the perpetuation of demonstrable error or hobble a courageous common-law court with a disability for self-correction. The sainted Cardozo not only said everything; he said it all: "The final cause of the law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. . . . If judges have woefully misinterpreted the mores of this day, or if the mores of their day are no longer those of ours, they ought not to tie in helpless submission the hands of their successors." Cardozo, *The Nature of the Judicial Process,* (1921) 66, 152, as quoted in *Cravens v. Inman,* ___ NE 2d ___, Ill. App. 4th (1991).

While numerous North Dakota cases have discussed sovereign immunity and the reasons for and against abolishment of the concept, this court suggests a periodic need to replace our thinking in this ever-changing world. It takes clear eyes to encourage change and to create chaos from which a solution can then be reached. "The written law is logical while the unwritten law is intuitive. We must have both for ongoing creativity, innovation, and relentless improvement of our society." Quote from Prof. Moshe Rubinstein on May 17, 1993 at the 1993 Judicial Institute, UND Law School.

The facts asserted in this present case, if viewed in a light most favorable to the plaintiff, begs for justice

through a public trial. If a state institution while under federal court monitoring and controlling at the time of the incidents, permitted these alleged acts to occur at the institution, then the State must not be allowed to hide behind the shield of sovereign immunity. While our law recognized the ability to hold employees liable for acts of gross negligence, a state institution and its officials must also be held accountable for negligence which may have occurred. After lengthy contemplation, this Court must provide the necessary and proper judicial intervention which this case yearns for.

As a public policy, this court determines the doctrine of sovereign immunity is archaic, unjust, and contrary to the general welfare of the citizenry of North Dakota. Thus, this court concludes it is no longer constitutionally based and public policy no longer requires sovereign immunity to protect the state from suit.

Accordingly, the Motion to Dismiss based on the doctrine of sovereign immunity is *denied*. Case will proceed to trial. Dated this 11th day of June, 1993.

BY THE COURT:

/s/ Lee A. Christofferson
Lee A. Christofferson
Judge of the District Court

APPENDIX 2

STATE OF NORTH DAKOTA IN DISTRICT COURT
COUNTY OF WALSH NORTHEAST JUDICIAL DISTRICT

Mark Levey by the Personal Representative of his Estate and Alma and Frank Levey, Parents of Mark Levey, deceased,	)	Civil No. 13821
Plaintiffs,	)	
vs.	)	
State Developmental Center, Grafton, North Dakota,	)	**ORDER**
Defendants.	)	

The court has reviewed the State's Motion For Reconsideration which includes the dismissal mandate of the North Dakota Supreme Court to District Judge Rothe in three cases where the State sought Writs of Supervisory Jurisdiction.

It is ironic that trial court judges with enough insight and courage to toss out an archaic and out-dated principle like sovereign immunity now appear to be the morons.

While it appears inevitable that our highest court will ignore the unique status of a small group of cases where plaintiffs earlier prevailed at the trial court level, I cannot in good conscience be a voluntary party to such a perceived injustice. If thy will be done, it shall be done by the North Dakota Supreme Court. Therefore, the Motion is ***denied.*** Accordingly, the State should pursue a Supervisory Writ in order to resolve this matter.

Dated this 6th day of December, 1994.

BY THE COURT:

/s/ Lee A. Christofferson
Lee A. Christofferson,
District Judge

APPENDIX 3

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER GRANTING SUPERVISORY WRIT
File No. 950013

State Developmental Center, Grafton, North Dakota, **Petitioner**

v.

Lee A. Christofferson, Judge of the District Court, Northeast Judicial District, and Mark Levey by the Personal Representative of his Estate and Lama [sic] and Frank Levey, Parents of Mark Levey, Deceased, **Respondents**

On January 11, 1995, a Petition for Supervisory Writ, Brief and Appendix in Support were filed by counsel for the Petitioner. Subsequently, on January 18, 1995, a Response Brief of Mark Levey, et al., was filed. The Court considered the matter, and

ORDERED, that the Petition for Supervisory Writ is granted, and

IT IS FURTHER ORDERED, that the Honorable Lee A. Christofferson enter an order dismissing the State Developmental Center, Grafton, North Dakota, as a Defendant in Civil No. 13821 filed in Walsh County District Court.

Dated at Bismarck, North Dakota, this 19th day of January, 1995.

/s/ Gerald W. VandeWalle
Gerald W. VandeWalle,
Chief Justice

/s/ Herbert L. Meschke
Herbert L. Meschke, Justice

/s/ Beryl J. Levine
Beryl J. Levine, Justice

/s/ William A. Neumann
William A. Neumann, Justice

/s/ Dale V. Sandstrom
Dale V. Sandstrom, Justice

ATTEST:

/s/ Penny Miller
Penny Miller, Clerk

APPENDIX 4

STATE OF NORTH DAKOTA IN DISTRICT COURT
COUNTY OF WALSH NORTHEAST JUDICIAL DISTRICT

Mark Levey by the Personal Representative of his Estate and Lama [sic] and Frank Levey, Parents of Mark Levey, Deceased, Plaintiffs, vs. State Developmental Center, Grafton, North Dakota, Defendant.	**JUDGMENT** FEB 24 1995 Civil No. 13821

IT IS HEREBY ORDERED that final judgment in this case is entered in favor of Defendant State Developmental Center providing that:

1. All claims against Defendant are barred by sovereign immunity;

2. No costs are requested by Defendant and accordingly no costs shall be awarded to Defendant.

Dated this 30th day of January, 1995.

BY THE COURT

/s/ Lee A. Christofferson
Lee A. Christofferson
Judge of the District Court

APPENDIX 5

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Mark Levey by the Personal Representative of his Estate and Alma and Frank Levey, Parents of Mark Levey, Deceased, Plaintiffs and Appellants

v.

State Developmental Center, Grafton, North Dakota, Defendant and Appellee

Civil No. 950054

Appeal from the District Court for Walsh County, Northeast Judicial District, the Honorable Lee A. Christofferson, Judge.

AFFIRMED.

Opinion of the Court by Levine, Justice,

Irvin B. Nodland, Bismarck, for plaintiffs and appellants.

Sara Beth Gullickson, Assistant Attorney General, Fargo, for defendant and appellee.

Levey v. State Developmental Center

Civil No. 950054

LEVINE, Justice.

Mark Levey, by the personal representative of his estate. and Alma and Frank Levey [hereinafter collectively "Leveys"] appeal from a district court judgment

dismissing their claims against the State Developmental Center in Grafton. The judgment of dismissal was entered in response to a supervisory writ issued by this court January 19, 1995.

The Leveys first challenge our decision in *Bulman v. Hulstrand Construction Co., Inc.*, 521 N.W.2d 632 (N.D. 1994), in which a majority of this court abolished the State's sovereign immunity from tort liability, except as to discretionary acts. We applied the decision prospectively, except as to the parties in *Bulman* and two other cases decided the same day. *Id.* at 640. The Leveys contend that the partial prospectivity of *Bulman* violates Art. I §§ 9, 21, and 22, and Art. IV § 44 of the North Dakota Constitution. We recently rejected these arguments in *Burr v. Kulas*, (Civil No. 940345, filed 6/1/95) ___ N.W.2d ___ (N.D. 1995).

The Leveys argue that even if the Developmental Center may claim the protection of sovereign immunity, the State waived immunity by purchasing insurance coverage for the Department of Human Services. We also rejected that argument in *Burr*. ___ N.W.2d at ___.

The Leveys also contend that the State Developmental Center waived the benefit of sovereign immunity under NDCC § 32-12.1-15(2). However, subsection 2 of section 32-12.1-15 expressly applies only to an "employee of the state . . . in the employee's personal capacity." That employee cannot be held liable unless the employee's acts "constitute reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct." *Id.* In their complaint, the Leveys did not name any employees in any capacity, much less in their "personal capacity," *i.e.*,

individually. Cf. *Burr*, ___ N.W.2d ___. Therefore, the trial court did not err in determining that the State Developmental Center did not waive its sovereign immunity under § 32-12.1-15(2).

Finally, the Leveys assert they are entitled to relief under 42 U.S.C. § 1983, for civil rights violations by persons acting under color of state law. But, a section 1983 action may not lie against the State because a state is not a "person" within the meaning of section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). *See also Livingood v. Meece*, 477 N.W.2d 183, 190 (N.D. 1991).

We, therefore, affirm the judgment of dismissal.

/s/ Beryl J. Levine
/s/ William A. Neumann
/s/ Dale V. Sandstrom
/s/ Herbert L. Meschke
/s/ Gerald W. VandeWalle, C.J.

Levey v. State Developmental Center

Civil No. 950054

MESCHKE, Justice, concurring.

I join in this decision. I write separately to add context, to emphasize the reasons for prospective application of the State's tort responsibility, and to propose direct judicial enforcement of constitutional rights on their own terms in future cases like this one.

As customary then, Alma and Frank Levey placed their six-year-old son, Mark, with the State Development

Center for the care and training of mentally retarded children at Grafton, North Dakota in 1960. On December 9, 1989, Mark, then age thirty-five, was removed to a local hospital for surgery on a severed intestine, allegedly injured from being beaten and kicked. Mark died from his injury on Christmas Day, 1989.

In 1991, Leveys sued the State Development Center for their son's injuries and wrongful death. According to the affidavit of a Center employee, before Mark was taken to the hospital for surgery on his severed intestine he had spent part of a day "laying on the floor holding his stomach and moaning in pain." The Leveys claimed that, "[i]n the years, months and days just prior to his death, Mark Levey was subjected to cruel and abusive treatment, beatings, and humiliations at the hands of staff personnel" at the Center. The Leveys blamed the Center, claiming it had "failed and neglected to monitor, observe and enforce standards of care for patients committed to [it] and as a result when Mark Levey was injured by beatings and other mistreatment of staff and patients, he died from injuries sustained and from lack of prompt, accurate and timely care."

The State moved to dismiss the Levey's suit on grounds it was "barred by the doctrine of sovereign immunity." Leveys obtained and filed some affidavits and statements to support their allegations that Mark had been abused, beaten, and injured. In June 1993, the trial court denied the State's motion to dismiss, concluding that "the doctrine of sovereign immunity is archaic, unjust, and contrary to the general welfare of the citizenry of North Dakota." The court decided it "must

provide the necessary and proper judicial intervention which this case yearns for."

In 1994, this court abolished the State's sovereign immunity from tort liability, except for discretionary governmental acts. *Bulman v. Hulstrand Construction Co., Inc.*, 521 N.W.2d 632 (N.D. 1994). This change resulted from a revised reading of the guarantee in the Declaration of Rights in the North Dakota Constitution, Art. I, § 9, that "All courts shall be open, and every man for any injury done him . . . shall have remedy by due process of law," meaningfully making government no less responsible for its wrongdoing than any other person or entity. *Id.* at 634-37. We applied the change prospectively, however, except for the prevailing claimants in *Bulman* and two other pending cases decided at the same time. *Id.* at 640. This prospective application foreclosed other cases pending in the trial courts.

After the prospective decision in *Bulman* and in October 1994, the State renewed its motion to the trial court to dismiss this case. In November 1994, the trial court again denied dismissal. The State promptly moved for reconsideration, pointing out to the trial court that this court had also "recently granted three supervisory writs ordering a district court judge to dismiss [other pending] cases against the State on Sovereign immunity grounds." The trial court uneasily adhered to its denial of a dismissal, noting the great irony in a prospective change barring this most deserving claim.

In January 1995, the State sought a supervisory writ from this court to direct the trial court to grant the renewed motion to dismiss. In keeping with *Bulman's*

promise to the State of prospective application of the State's renewed tort responsibility, this court promptly ordered the trial court to dismiss this action against the State Development Center. The trial court did so. The Leveys appealed. Today, we reject the Levey's additional arguments, adhere to the prospective application of the State's tort responsibility, and affirm the supervised judgment of dismissal.

Because this case would ordinarily merit a trial to resolve serious allegations of outrageous conduct by State employees, officials, and supervisors, which normally are taken as true at the pleading stage before trial, I concur hesitantly and reluctantly. I believe the State's substantial fiscal reliance on a long-standing judicial misinterpretation of the constitution is a sufficient reason for prospective application.

That was the reason for the similar prospective application twenty years ago, when *Kitto v. Minot Park District*, 224 N.W.2d 795 (N.D. 1974), made local governments prospectively responsible for their wrongdoings. "A change of such far-reaching application requires careful consideration of the manner in which it is to be applied to minimize confusion and injustice for those relying upon previous decisions of this court." *Id.* at 803-04.[1] *Kitto*

---

[1] With some reason, Leveys question whether the State could fairly rely on the old misinterpretation after *Kitto* pointedly recommended legislative action to abolish the State's sovereign immunity, as well. 224 N.W.2d at 804. "[L]egislation to provide a remedy against the state would be an essential subject of consideration." *Id.* The State took only minimal action to authorize State agencies to purchase insurance or join an insurance pool. *See* NDCC 32-12.1-15(1) and its antecedents. Leveys

identified two principal purposes of prospective application: "to allow those governmental bodies which have relied upon our previous decisions adequate time to arrange liability insurance coverage for their acts or omissions" and "to allow the legislature opportunity to adopt such legislation as it deems advisable to mitigate any hardships arising from this decision." *Id.* at 804. Those considerations equally justify today's decision denying retroactive application of *Bulman's* change.

Yet, government institutions, officers, and employees cannot be above the laws and must be legally accountable for wrongful conduct. "The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind [from those inflicted by private parties]." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 409 (1971) (J. Harlan, concurring). Governmental accountability has a new beginning under *Bulman v. Hulstrand Construction Co., Inc.*, 521 N.W.2d 632. But, as this case – a casualty of

---

describe this half-hearted action as "whistling through the graveyard," because the Legislature made the change contradictory: "Participation in a self-insurance pool under this chapter does not constitute a waiver of any existing immunities otherwise provided by the constitution or laws of this state." NDCC 26.1-23.1-02 (part). Despite this misguided gamesmanship, I recognize that the public pocketbook has been, in fact, managed in reliance on sovereign immunity. In my opinion, that reliance interest, combined with judicial respect for the legislative prerogative as part of doctrinal separation of powers, justifies the prospective application of *Bulman's* change that makes the State responsible for wrongdoings like all its citizens are. After seventy years of injustice through judicial misinterpretation, a short delay can be no worse.

the prospective effect of a corrected reading of the access-to-the-courts guarantee of the constitution's Declaration of Rights – illustrates, the checks and balances implicit in the doctrine of separation of powers should continue governmental accountability through the judicial branch.

The fundamental principle of separation of powers necessitates, I believe, judicial enforcement of each of the rights of an individual declared in the North Dakota Constitution. A state constitutional right is "self executing" if the judiciary can enforce it without the assistance of a legislative enactment. *Davis v. Burke,* 179 U.S. 399, 403 (1900) (declaring a provision of the Idaho constitution to be "self executing"; "where a constitution asserts a certain right, . . . it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions.") In his brilliant concurrence in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. at 407, Justice Harlan proclaimed: "[T]he judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment." In granting an individual a monetary remedy for violation of the Fourth Amendment guarantee against unreasonable searches and seizures, the *Bivens* majority, 403 U.S. at 397, quoted the landmark opinion in this field. Nearly two centuries ago, Justice Marshall in *Marbury v. Madison,* 1 Cranch 137, 163 (1803), said: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

Like the Bill of Rights in the United States Constitution, enforced in *Bivens* by a judicial damage remedy, the Declaration of Rights in the North Dakota Constitution

guarantees an individual's rights against government action. Thus, Article I, § 8, guarantees: "The right of the people to be secure in their persons, . . . against unreasonable . . . seizures shall not be violated. . . . " If Mark Levey was abused and beaten by state employees in a state institution, then the state institution itself made an unreasonable seizure, if any supervisor had knowledge of the wrongdoings, and either directly ordered them, condoned them, or failed to properly exercise their duty to prevent them. Only a judicial damage remedy could vindicate Mark Levey's constitutional right to be secure against unreasonable seizures.

For whatever reason, Leveys did not make their claim for Mark's injuries against any individual employee of the State Development Center, as they might have. If Leveys had done so, they would undoubtedly have been entitled to a trial of their claim under 42 U.S.C. § 1983 for civil rights violations by "persons" acting under color of state law. *See also Rosenberg v. Crandell,* ___ F.3rd ___ (8th Cir. No. 94-3574SD; May 30, 1995) (holding prison infirmary assistants liable in a prisoner's *Bivens* action for deliberate indifference to serious medical needs). But today's opinion of this court written by Justice Levine correctly concludes that a § 1983 action cannot be brought against the State. *Will v. Michigan Dep't Of State Police,* 491 U.S. 58 (1989); *Livingood v. Meece,* 477 N.W.2d 183, 190 (N.D. 1991). These decisions show a state is not a "person" for § 1983 liability.

Though a *Bivens*-type enforcement of the constitutional guarantee against unreasonable seizures was not presented in this case, a state constitutional right can be vindicated on its own terms by judicial enforcement

through a *Bivens*-type action. *See* Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution,* 68 S. Cal. L. Rev. 289 (1995); Tammy Wyatt-Shaw, *The Doctrine of Self-Execution and The Environmental Provisions of The Montana State Constitution: "They Mean Something,"* 15 Pub. Land L. Rev. 219 (1994); John M. Baker, *The Minnesota Constitution As A Sword: The Evolving Private Cause of Action,* 20 Wm. Mitchell L. Rev. 313 (1994). Mark Levey's constitutional right to security from unreasonable seizures could have been enforced only by a posthumous trial for money damages. No other remedy can effectively vindicate an individual's rights against wrongful government conduct after the individual has died from the wrongful conduct.

While it is too late for that remedy for Mark Levey, I submit, in the future, a judicial remedy in damages should be available to directly enforce a constitutional right against governmental wrongdoing.

/s/ Hubert L. Meschke

APPENDIX 6

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Joyce Burr, Plaintiff and Appellant

v.

Cheryl Kulas and
Donald K. Lemon, Ph.D., Defendants and Appellees

Civil No. 940345

Appeal from the District Court for Burleigh County, South Central Judicial District, the Honorable Dennis A. Schneider, Judge.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Opinion of the Court by VandeWalle, Chief Justice. Irvin B. Nodland, P.C., Bismarck, for plaintiff and appellant.

Sara Beth Gullickson, Assistant Attorney General, Fargo, for defendant and appellee Cheryl Kulas.

David E. Reich, Special Assistant Attorney General, of Pearce & Durick, Bismarck, for defendant and appellee Donald K. Lemon.

Burr v. Kulas

Civil No. 940345

VandeWalle, Chief Justice.

Joyce Burr appealed from an order denying her motion to reconsider the trial court's order granting summary judgment dismissing her action against Cheryl Kulas and Donald K. Lemon on the ground of sovereign immunity and affirming the initial order. We affirm in part, reverse in part, and remand for further proceedings.

In 1993, Burr sued Kulas and Lemon, alleging: (1) Burr began doctoral studies at the University of North Dakota in 1985, with Lemon as her advisor; (2) Burr stored her original works, ideas, documents, and manuscripts on computer discs in her desk in her office at U.N.D.; (3) Near the end of February 1989, Burr underwent surgery requiring her hospitalization for nearly two weeks; (4) In March 1989, Lemon authorized the theft of Burr's doctoral materials; (5) After the theft of Burr's property, it was delivered to Kulas, who used Burr's creative ideas and materials for professional, financial and other gain; (6) Kulas knowingly used the stolen property for the purpose of writing and submitting to the University of Arizona a master's thesis, which Kulas copyrighted to prevent anyone, including Burr, from using or duplicating materials therein; (7) Kulas, Lemon, and others conspired to commit theft of computer discs and other written materials containing valuable original ideas and conspired to put Burr's property to their use; (8) Lemon and Kulas violated Ch. 12.1-06.1, N.D.C.C.,[1] in stealing, receiving, or using her property. Burr's prayer for relief sought damages for loss of a doctoral degree

and associated employment opportunities, theft and conversion of original intellectual property, infliction of emotional harm, punitive damages, a trebling of the basic damage award under § 12.1-06.1-03, N.D.C.C., and reasonable attorney fees, costs, and expenses.

Kulas answered the complaint by generally denying the material allegations, specifically denying any intentional or wrongful conduct, and asserting that she was entitled to statutory immunity under § 26.1-21-10.1, N.D.C.C. Lemon answered with a general denial, asserted that the complaint failed to state a claim upon which relief could be granted, asserted that his actions "were taken in his official capacity as a professor at UND and therefore the claims against him are barred by sovereign immunity," and asserted that Burr's claim against him "in his individual capacity is barred by qualified immunity and statutory immunity."

On May 23, 1994, Lemon filed a motion to change venue of the action against him from the district court of Burleigh County to the district court of Grand Forks County and to consolidate it for trial with the related pending case of *Joyce Burr v. Richard G. Landry,* The trial court denied the motion to change venue on the ground that it was untimely under § 28-04-06, N.D.C.C., and because Lemon failed to show that the requested change of venue would promote the convenience of witnesses or the ends of justice. The trial court denied the motion to consolidate because that motion was mooted by the court's failure to grant the change of venue to Grand Forks County.

Kulas moved for judgment on the pleadings under Rule 12, N.D.R.Civ.P., or for summary judgment under Rule 56, N.D.R.Civ.P. Burr resisted the motion. After Kulas and Burr filed their briefs and supporting documents, the trial court granted Kulas's motion for summary judgment dismissing the action on the ground of sovereign immunity. The trial court also dismissed Burr's claim against Lemon, even though he did not move for summary judgment, reasoning that, as to Lemon "the result as a matters of law would be the same" as it was with Kulas.[2] The trial court denied Burr's motion for reconsideration and Burr appealed.

Except for discretionary acts, in *Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994), a majority of this court abolished the State's sovereign immunity from tort liability. The court applied the decision prospectively, except for it and two other cases:

> "Furthermore, although we abrogate the State's sovereign immunity from tort liability, we conclude that abrogation should be prospective so that the Legislature can implement and plan in advance by securing liability insurance, or by creating funds necessary for self-insurance. Accordingly, except as to this case and two contemporaneous cases decided today, *Farris v. North Dakota Centennial Commission*, 521 N.W.2d 643 (N.D. 1994), and *Hosman v. North Dakota State University*, 521 N.W.2d 643 (N.D. 1994), we abolish sovereign immunity for claims arising fifteen days after adjournment of the fifty-fourth legislative assembly."

521 N.W.2d at 640.[3]

Relying on *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), Burr contends that the partially prospective application of *Bulman* violates the equal protection and due process clauses of the United States Constitution. However, we have held that when a "substantive issue involves state law, we are not precluded from applying the *Chevron* factors to determine retroactivity or prospectivity of our decision." *Kadrmas, Lee & Jackson, P.C. v. Bolken*, 508 N.W.2d 341, 347 (N.D. 1993). *See also Muller v. Custom Distributors, Inc.*, 487 N.W.2d 1, 5 n.7 (N.D. 1992) ("Under [*Great Northern Ry. Co. v.*] *Sunburst* [*Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932)], state courts are not precluded from using the *Chevron* factors in decisions changing state law."). The *Chevron* factors referred to are factors enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), which may be considered in determining if a decision announcing a new rule of law should be applied retroactively or prospectively. *Griffith* and *Beam* do not preclude us from employing a *Chevron* analysis to decide whether to apply a decision involving state law retroactively, prospectively, or in some form of partial prospectivity.

Burr contends that to abolish sovereign immunity as to the parties in *Bulman*, two other cases decided the same day, and to future claims, but not to existing claims violates Art. I, §§ 9 and 22, and Art. IV, § 44, N.D. Const. In view of our previous decisions applying a new rule of law prospectively, we need not extensively discuss this contention. We are not persuaded that the decision in

Bulman violated any provisions of the North Dakota Constitution.

Burr contends that participation in the North Dakota Insurance Reserve Fund waived the State's sovereign immunity. We disagree. *See* § 26.1-23.1-02, N.D.C.C. ("Participation in a self-insurance pool under this chapter does not constitute a waiver of any existing immunities otherwise provided by the constitution or laws of this state.") and § 32-12.1-15(1), N.D.C.C. ("No purchase of insurance pursuant to this section or participation in a government self-insurance pool may be construed as a waiver of any existing immunity to suit.").

We conclude that the trial court properly dismissed any claims against the State or against Kulas and Lemon in their official capacities on the ground of sovereign immunity.

Burr's RICO claims against Kulas and Lemon, individually, and their immunity defenses, however, involve genuine issues of material fact precluding summary judgment.

Relying on *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989), and Rules 9(h) and 10(a), N.D.R.Civ.P., Kulas argues that she has not been sued in her individual capacity. Lemon also contends that he has not been sued in his individual capacity. We disagree.

In *Nix v. Norman, supra*, 879 F.2d at 431, the court said:

> "As a judgment against a public servant in his individual capacity exposes him or her to compensatory and punitive damages, we have

> repeatedly stated that section 1983 litigants wishing to sue government agents in both capacities should simply use the following language: 'Plaintiff sues each and all defendants in both their individual and official capacities.' "

The court also said that Rule 9(a), F.R.Civ.P., "appears to *require* Nix to make a capacity stipulation in the complaint" because "[t]he Eleventh Amendment presents a jurisdictional limit on federal courts in civil rights cases against states and their employees." *Id.*

Kulas has requested that we "extend the holding in *Nix* to the present case requiring Burr to make a capacity stipulation in her Complaint." If we were inclined to extend *Nix,* we would not do so on the basis of the complaint filed in this case. There is no Eleventh Amendment issue in this case. Anyone unsure about whether either defendant was being sued in his or her individual capacity should have done as the trial court did in *Kristensen v. Strinden,* 343 N.W.2d 67, 71 (N.D. 1983), and ask Burr if either defendant "was being sued in his individual capacity, his official capacity . . . , or both." From our examination of the complaint, we conclude that it clearly states claims against Kulas and Lemon, individually. Our only question is whether the complaint states any claims against either defendant in his or her official capacity, but that question is moot in light of the parties' apparent agreement that it does and of our resolution of the sovereign immunity issue.

The trial court recognized that there were important factual issues with regard to Burr's RICO claims:

> "The RICO portion of the complaint presents a unique legal question. There are major

> and substantial factual questions which all revolve around the central question of: 'Did Ms. Kulas, Dr. Lemon or Dr. Landry know that the materials used were the plaintiff's?' That is fundamentally and totally factual and thus a jury question. Further, whether the defendants' acts were so egregious (i.e., grossly negligent, malfeasance, or willful wanton misconduct) as to remove themselves from the 'blessings' of statutory immunity [Section 32-12.1-15(2)] is also fundamentally a jury question."

Nevertheless, the court granted dismissal, ruling that "the sovereign is [ ] immune, as are its agents." We agree with the trial court that the RICO portion of Burr's complaint presents "substantial factual questions." We conclude that those questions present genuine issues of material fact precluding summary judgment. We also conclude that the immunity defenses asserted by Kulas and Lemon raise genuine issues of material fact precluding summary judgment.

The immunity defenses asserted by Kulas and Lemon are limited by §§ 32-12.1-15(2) and 26.1-21-10.1(1)(b), N.D.C.C. Section 32-12.1-15(2), N.D.C.C., provides:

> "No employee of the state may be held liable in the employee's personal capacity for actions or omissions occurring within the scope of the employee's employment unless such actions or omissions constitute reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct."

Section 26.1-21-10.1(1)(b), N.D.C.C., provides:

> " 'Scope of office or employment' means the officer or employee was acting on behalf of the

> state in the performance of duties or tasks lawfully assigned to the employee by competent authority. Actions of an employee which constitute reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct are not within the scope of the employee's office or employment for purposes of this chapter."

"On appeal from a summary judgment, the evidence is viewed in a light most favorable to the party against whom the summary judgment was granted." *Wheeler v. Schmid Laboratories, Inc.*, 451 N.W.2d 133, 136 (N.D. 1990). Such things as knowledge, *Wheeler v. Schmid Laboratories, Inc., supra,* intent, *State v. Miller,* 466 N.W.2d 128 (N.D. 1991), negligence, *Wanner v. Getter Trucking, Inc.,* 466 N.W.2d 833 (N.D. 1991), and state of mind, *State v. Franck,* 499 N.W.2d 108 (N.D. 1993), are ordinarily questions of fact.

Burr asserted in an affidavit: Lemon was her advisor when she was a graduate student at UND; she kept her writing and research materials on computer discs in her office; in March of 1989, Dr. Lemon conspired in the theft of her doctoral materials, including a survey instrument, which were delivered to Kulas, who used them to complete and copyright a master's thesis; Janet Ahlers testified in a deposition in a related case "that when she attempted to discuss the taking of my materials with Dr. Landry and Dr. Lemon, she was 'shussed' so as to indicate she should not be talking so loud about it in a public hallway at the school with the inference that people might hear what happened;" and the theft of her property was "willful, was intentional, and wrongful."

Kulas stated in an affidavit:

> "4. In developing my survey form, I reviewed approximately thirty surveys, including Joyce Burr's survey which I received from Dr. Landry.
>
> "5. When Dr. Landry provided me with copies of the survey documents, I had no knowledge where he obtained the information. I had no knowledge that Joyce Burr had not consented to my using her survey form. In fact, I assumed that she had consented to my using the survey form.
>
> * * *
>
> "7. To the best of my knowledge, only six or seven questions out of forty-five questions on my survey instrument were used verbatim from Joyce Burr's survey instrument."

When her deposition was taken, Kulas was asked if she knew where the survey instrument given to her by Dr. Landry came from. Kulas replied: "Well, I sort of had a sense that I might have known where it came from." Kulas further explained: "[M]y sister, who is a friend of [Burr], had indicated that she was undertaking a study of the Indian studies course, and so I assumed that that might have been, you know, where it would have come from." Kulas also said that Dr. Landry "may have" told her where the survey instrument came from, but she "didn't pay much attention to it, really." In a March 7, 1990, letter to Burr, Kulas acknowledged that she "exercised poor judgment in accepting and using aspects of the survey."

Janet Ahlers stated in a deposition that at a meeting on March 1, 1989, she was assured "that they would not conduct research that would impinge on Joyce Burr's dissertation topic." Ahlers also said that she saw Dr. Landry and Dr. Lemon in a stairwell of the Education Building and asked, "what is going on with DPI using Joyce's survey? And what I recall is that Dr. Landry put his finger up to his mouth and went sh (indicating)."

Viewing the evidence in the light most favorable to Burr, against whom summary judgment was granted, we conclude that there are genuine issues of material fact, precluding the entry of summary judgment, as to both (1) Burr's RICO claims, with regard to whether Lemon or Kulas in their personal capacity engaged in theft when they knowingly took, exercised unauthorized control over, made an unauthorized transfer of, obtained, received, retained, or disposed of Burr's property with intent to deprive Burr of her property, or if Lemon or Kulas engaged in computer fraud by gaining access to, altering, damaging, modifying, copying, disclosing, or taking possession of any part of Burr's computer system storing her intellectual property; and (2) whether Lemon's and Kulas's activities with regard to Burr's intellectual property constituted reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct, exposing them to possible personal liability under § 32-12.1-15(2), N.D.C.C., because their conduct was not within the scope of their employment under § 26.1-21-10.1(1)(b), N.D.C.C.

The order granting summary judgment for Lemon and Kulas is affirmed insofar as it dismisses any claims against the State or against Lemon and Kulas in their

official capacities as State employees, on the ground of sovereign immunity, and is otherwise reversed and the matter is remanded for further proceedings with regard to the claims against Lemon and Kulas individually, in their personal capacities.

/s/ Gerald W. VandeWalle, C.J.

/s/ Dale Sandstrom

/s/ William A. Neumann

/s/ Beryl J. Levine

/s/ Herbert L. Meschke

---

[1] Chapter 12.1-06.1, N.D.C.C., deals with racketeer influenced and corrupt organizations. Burr's claims under that chapter will hereinafter be referred to as RICO claims.

[2] Rule 56(c), N.D.R.Civ.P., provides in part: "Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "[A]llowing summary judgment to be entered for the nonmoving party in the absence of a formal cross-motion is appropriate." 10A Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil 2d § 2720*, p. 33 (1983).

[3] The fifty-fourth legislative assembly enacted Senate Bill 2080 creating Chapter 32-12.2, N.D.C.C., relating to the civil liability of the state.

Supreme Court, U.S.
FILED
OCT 10 1995
CLERK

(2)

No. 95-383

In The

Supreme Court of the United States

October Term, 1995

MARK LEVEY BY THE PERSONAL REPRESENTATIVE OF HIS ESTATE and ALMA AND FRANK LEVEY, PARENTS OF MARK LEVEY, DECEASED,

Petitioner,

vs.

STATE DEVELOPMENTAL CENTER, GRAFTON, NORTH DAKOTA,

Respondent.

On Petition For Writ Of Certiorari To The North Dakota Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

LAURIE J. LOVELAND
Solicitor General
Office of Attorney General
900 E. Boulevard
Bismarck, ND 58505-0041
(701) 328-3640
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Fifth or Fourteenth Amendment to the United States Constitution restrict a state supreme court's authority to limit the retroactive application of its decision changing its interpretation of its state constitution and state common law?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS THE PETITION SHOULD BE DENIED .. 5

1. Prior decisions of this Court establish that under the U.S. Constitution the retroactive or prospective application of state court decisions on questions of state law is a matter of state law left to the authority of the state courts. Accordingly, the prospectivity decision of the North Dakota Supreme Court at issue here does not present a substantial federal question that has not been resolved by, or that is in conflict with, a decision of this Court 5

2. The decision below does not decide an important federal question in a manner that conflicts with a decision of another state court of last resort or of a United States court of appeals 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

A.B.C.G. Enterprises, Inc. v. First Bank Southeast, N.A., 515 N.W.2d 904 (Wis. 1994) 14

American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) 7

Beavers v. Johnson Controls World Servs., Inc., 881 P.2d 1376 (N.M. 1994) 13

Brockie v. Omo Constr., Inc., 887 P.2d 167 (Mont. 1994) 14

Bulman v. Hulstrand Constr. Co., Inc., 521 N.W.2d 632 (N.D. 1994) ..... *passim*

Carrollton-Farmers Branch Ind. Sch. Dist. v. Edgewood Ind. Sch. Dist., 826 S.W.2d 489 (Tex. 1992) 13

City of Miami v. Bell, 634 So.2d 163 (Fla.), *cert. denied*, 115 S. Ct. 316 (1994) 14

City of New Bern v. New Bern-Craven County Bd. of Educ., 450 S.E.2d 735 (N.C. 1994) 13

City of Richmond v. Blaylock, 440 S.E.2d 598 (Va. 1994) 14

Clarke v. Beckwith, 858 P.2d 293 (Wyo. 1993) 14

Doney v. Northern Pacific Ry. Co., 199 P. 432 (Mont. 1921), *overruled*, 7 P.2d 919 (Mont. 1932) 5, 7

Effertz v. North Dakota Workers' Comp. Bureau, 481 N.W.2d 223 (N.D. 1992) 1

Fager v. Hundt, 610 N.E.2d 246 (Ind. 1993) 14

Ferris v. North Dakota Centennial Commission, 521 N.W.2d 643 (N.D. 1994) 3

TABLE OF AUTHORITIES – Continued

Page

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932).....5, 7, 8, 9, 10

Griffith v. Kentucky, 479 U.S. 314 (1987).... 9, 11, 12, 13

Hardaway v. County of Lexington, 443 S.E.2d 569 (S.C. 1994) 14

Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993) 9, 10, 12, 13, 14

Heasley v. State, 115 N.W.2d 334 (N.D. 1962)..... 2

Hickel v. Halford, 872 P.2d 171 (Alaska 1994)..... 14

Hosman v. North Dakota State University, 521 N.W.2d 643 (N.D. 1994)..... 3

Howard v. Thrifty Drug and Discount Stores, 895 P.2d 469 (Cal. 1995) 14

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 9, 10, 12, 13, 14

Jones v. Hansen, 867 P.2d 303 (Kan. 1994)..... 14

Kennecott Corp. v. State Tax Comm'n, 862 P.2d 1348 (Utah 1993) 13

Kincaid v. Mangum, 432 S.E.2d 74 (W. Va. 1993)...13, 14

King v. Cuomo, 613 N.E.2d 950 (N.Y. 1993) 14

Landmark Medical Center v. Gauthier, 635 A.2d 1145 (R.I. 1994)..... 14

Larsen v. Sioux Falls Sch. Dist. No. 49-5, 509 N.W.2d 703 (S.D. 1993) 14

Leadbetter v. Rose, 467 N.W.2d 431 (N.D. 1991), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994) 2

TABLE OF AUTHORITIES – Continued

Page

Livingood v. Meece, 477 N.W.2d 183 (N.D. 1991)..... 2

Mackey v. United States, 401 U.S. 667 (1971)..... 7

Martin Marietta Corp. v. Lorenz, 823 P.2d 100 (Colo. 1992)..... 13

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dep't of Business Regulation, 496 U.S. 18 (1990) 10, 11

Montells v. Haynes, 627 A.2d 654 (N.J. 1993)..... 13

Oliver v. Schultz, 885 S.W.2d 699 (Ky. 1994)..... 14

Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633 (Md. 1992)..... 14

Patch v. Sebelius, 320 N.W.2d 511 (N.D. 1982)..... 2

Reynoldsville Casket Co. v. Hyde, 115 S. Ct. 1745 (1995)..... 9

Robinson v. Stewart, 655 So.2d 866 (Miss. 1995) 14

Schloesser v. Larson, 458 N.W.2d 257 (N.D. 1990), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994) 2

Senger v. Hulstrand Constr., Inc., 320 N.W.2d 507 (N.D. 1982), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994)..... 2

Spielman v. State, 91 N.W.2d 627 (N.D. 1958), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994)..... 2

Stoltz Management Co., Inc. v. Consumer Affairs Bd., 616 A.2d 1205 (Del. 1992)..... 14

TABLE OF AUTHORITIES – Continued

Page

Vermont Acc. Ins. Co. v. Howland, 648 A.2d 819 (Vt. 1993) 14

Wilderness World, Inc. v. Department of Revenue, 895 P.2d 108 (Ariz. 1995) 14

Wright v. State, 189 N.W.2d 675 (N.D. 1971), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994) 2

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2 11

U.S. Const. art. VI, cl. 2 10

U.S. Const. amend. V 11, 12, 13, 14, 15

U.S. Const. amend. XIV 11, 12, 13, 14, 15

N.D. Const. art. I, § 9 ..... 1, 2, 8

MISCELLANEOUS

1995 N.D. Sess. Laws 3

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the North Dakota Supreme Court's opinion in this case. That opinion is reported at 533 N.W.2d 707 (1995).

STATEMENT OF THE CASE

Because Petitioner's case was dismissed on the basis of the State of North Dakota's sovereign immunity, the facts underlying Petitioner's claim as stated on pages 3 to 6 of the Petition have not been adjudicated by any court and Respondent disputes many of those facts. However, that dispute and the accuracy of Petitioner's alleged facts are irrelevant to this Court's consideration of the legal question presented in the Petition. The facts significant to the question presented are stated below.

In December 1991 Petitioner brought a state court wrongful death action against Respondent seeking money damages. Respondent moved to dismiss the suit on sovereign immunity grounds.

Under North Dakota sovereign immunity law in effect at that time, the North Dakota Supreme Court had interpreted N.D. Const. art. I, § 9, as giving the North Dakota Legislature the exclusive power to authorize tort suits against the State and found that the Legislature had not authorized most tort actions, including wrongful death actions, against the State. *See Effertz v. North Dakota Workers' Comp. Bureau*, 481 N.W.2d 223, 224 (N.D. 1992);

Livingood v. Meece, 477 N.W.2d 183, 189 (N.D. 1991); *Leadbetter v. Rose*, 467 N.W.2d 431, 434-37 (N.D. 1991), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994); *Schloesser v. Larson*, 458 N.W.2d 257, 258-59 (N.D. 1990), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994); *Patch v. Sebelius*, 320 N.W.2d 511, 513-14 (N.D. 1982); *Senger v. Hulstrand Constr., Inc.*, 320 N.W.2d 507, 508-10 (N.D. 1982), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994); *Wright v. State*, 189 N.W.2d 675, 677-79 (N.D. 1971), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994); *Heasley v. State*, 115 N.W.2d 334, 335-36 (N.D. 1962); *Spielman v. State*, 91 N.W.2d 627, 629-31 (N.D. 1958), *overruled sub nom. Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994).

The trial court denied Respondent's motion to dismiss, concluding "the doctrine of sovereign immunity . . . is no longer constitutionally based and public policy no longer requires sovereign immunity to protect the state from suit." (Pet. App. at App. 5.) No further action was taken in the case for some time.

On September 13, 1994, in *Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632 (N.D. 1994), the North Dakota Supreme Court changed its long-standing interpretation of N.D. Const. art. I, § 9, overruling the North Dakota cases cited above, and concluded that the court and not just the Legislature had the authority to modify or waive the common law doctrine of sovereign immunity and permit tort suits against the State of North Dakota. *Id.* at 637. Finding that the doctrine of sovereign immunity was

"outdated" and "no longer warranted," the court overruled its prior cases sustaining the doctrine and judicially abolished it. *Id.* at 639. The court limited the retroactive effect of this abrogation, writing:

> [A]lthough we abrogate the State's sovereign immunity from tort liability, we conclude that abrogation should be prospective so that the Legislature can implement and plan in advance by securing liability insurance, or by creating funds necessary for self-insurance. Accordingly, except as to this case and two contemporaneous cases decided today, *Ferris v. North Dakota Centennial Commission*, 521 N.W.2d 643 (N.D.1994), and *Hosman v. North Dakota State University*, 521 N.W.2d 643 (N.D.1994), we abolish sovereign immunity for claims arising fifteen days after adjournment of the fifty-fourth legislative assembly.

521 N.W.2d at 640 (citations omitted).[1]

---

[1] The Fifty-Fourth North Dakota Legislative Assembly adjourned on April 7, 1995. *See* 1995 N.D. Sess. Laws at I, II. Accordingly, the supreme court's abrogation of sovereign immunity in *Bulman* was effective fifteen days later on April 22, 1995, not April 21, 1995, as stated in the Petition at pages 3 and 7. Also, Petitioner asserts – without any citation of authority – that when *Bulman* was decided "some 21 other plaintiffs had tort cases pending against the State of North Dakota in the trial courts of North Dakota." (Petition at 7.) To the best of counsel's knowledge and belief, neither the record in this case nor any other definitive source establishes the specific number of cases against the State or an arm of the State pending in the trial courts at the time of the *Bulman* decision.

On October 17, 1994, Respondent filed a Renewed Motion to Dismiss, arguing that Petitioner's action continued to be barred by sovereign immunity pursuant to the *Bulman* decision and the pre-existing law. The district court denied that motion. Respondent moved the district court to reconsider that denial in light of the North Dakota Supreme Court's recent issuance of supervisory writs in three procedurally similar cases; those writs mandated district court dismissal of tort suits against the State. The district court denied the Motion for Reconsideration. (Pet. App. at App. 6.)

Respondent next filed a Petition for Supervisory Writ in the North Dakota Supreme Court, asking that court to direct the trial court to dismiss Petitioner's action. The supreme court granted the writ and ordered the trial court to dismiss the lawsuit. (Pet. App. at App. 8.) The trial court then entered final judgment in favor of Respondent on sovereign immunity grounds. (Pet. App. at App. 10.) Petitioner filed a timely appeal to the North Dakota Supreme Court. (Record 96 (Notice of Appeal).)

On appeal, the North Dakota Supreme Court entered a decision on June 27, 1995, affirming the judgment of dismissal and rejecting Petitioner's contention that the prospectivity ruling in *Bulman* violated the North Dakota Constitution. (Pet. App. at App. 12-13.)

REASONS THE PETITION SHOULD BE DENIED

1. Prior decisions of this Court establish that under the U.S. Constitution the retroactive or prospective application of state court decisions on questions of state law is a matter of state law left to the authority of the state courts. Accordingly, the prospectivity decision of the North Dakota Supreme Court at issue here does not present a substantial federal question that has not been resolved by, or that is in conflict with, a decision of this Court.

Although Petitioner has attempted to phrase the question presented in terms of Petitioner's federal constitutional rights, the real issue here is state courts' authority to establish their own jurisprudence with regard to retroactivity or prospectivity of their decisions on questions of state law. This Court resolved that issue in *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). In *Sunburst* the Court established that this is not a federal law question and the Constitution does not require state courts to apply their decisions retroactively.

The primary issue below in *Sunburst* had been the construction of a state statute concerning rail rate regulation. 287 U.S. at 359. In its decision the Montana Supreme Court had overruled *Doney v. Northern Pacific Ry. Co.*, 199 P. 432 (Mont. 1921), *overruled*, 7 P.2d 919 (Mont. 1932), which had interpreted a Montana statute, and then held *Doney* would continue to apply to parties who had relied on that decision; that is, the Montana court held that its decision overruling *Doney* would be effective prospectively. 287 U.S. at 361. The petitioner argued the Montana Supreme Court's prospectivity ruling violated the Federal

Constitution. *Id.* The Court rejected that argument in an opinion authored by Justice Cardozo, writing:

> We have no occasion to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of *stare decisis* as known to the common law. *Sound or unsound, there is involved in it no denial of a right protected by the federal constitution.* . . . This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.
>
> *We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.* It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. . . . On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. The alternative is the same whether the subject of the new decision is common law or statute. *The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature.* We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring

> common law for those within her borders. . . . If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process.

Id. at 364-66 (emphasis added) (citations omitted) (footnotes omitted).

The *Sunburst* holding was cited with apparent approval by both the plurality and the dissenting opinions in *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990) (*"ATA"*). The plurality opinion stated:

> The determination whether a constitutional decision of this Court is retroactive – that is, whether the decision applies to conduct or events that occurred before the date of the decision – is a matter of federal law. *When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.* See *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932) . . . .

496 U.S. at 177-78 (plurality opinion) (emphasis added). The dissenting opinion in *ATA* noted: *"Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), merely holds that the Federal Constitution imposes no barrier to a state court's decision to apply a new state common-law rule prospectively only." 496 U.S. at 223 n.12 (Stevens, J., dissenting) (quoting *Mackey v. United*

States, 401 U.S. 667, 698 (1971) (Harlan, J., concurring in judgment in part and dissenting in part)).

In this case the decision below was based on the North Dakota Supreme Court's decision in *Bulman* abolishing the State's sovereign immunity. The *Bulman* decision was based strictly on state law. *See* 521 N.W.2d at 634-40. It concerned the interpretation of N.D. Const. art. I, § 9, and a re-interpretation of the state common law to permit tort suits against the State. *See* 521 N.W.2d at 634-40. The opinion does not cite or rely upon federal law in its discussion of either sovereign immunity or prospectivity. *See id.* As permitted by *Sunburst*, the North Dakota Supreme Court made its own choice with regard to the limits of adherence to precedent.[2]

---

[2] The North Dakota Supreme Court's prospectivity ruling in *Bulman* was the most equitable ruling possible given its substantive decision in that case. Whether or not, as judicial scholars may argue, courts *should* be in the business of "making law," that is what the North Dakota Supreme Court did in this instance. Before the *Bulman* decision long-standing (and well-reasoned) law established that only the Legislature could permit tort suits against the State and no such suits were authorized. See cases cited, supra pp. 1-2. In *Bulman* the supreme court changed that interpretation and went further to *create* a new tort cause of action against the State. The *Bulman* decision is more similar to legislation, which generally has only prospective effect, than to judicial decision-making, which generally has retroactive effect. The supreme court was aware that because of this significant change in the law and State agencies' reliance on the previously well-established law of sovereign immunity, State agencies did not have the resources (or the litigation-prevention measures, such as preservation of putative evidence) in place to defend against possible suits, had *Bulman* been applied retroactively. Although the State would have preferred a "pure" prospectivity ruling in *Bulman*, the State

Petitioner appears to argue that *Sunburst* is no longer good law in light of the recent decisions by this Court in *Griffith v. Kentucky*, 479 U.S. 314 (1987); *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993); and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) ("*Beam*"); and that the North Dakota Supreme Court decision below conflicts with those decisions. (Petition at 9-10.) Petitioner's argument is meritless for several reasons.

First, the analysis in this Court's recent retroactivity decisions is irrelevant to the law established in *Sunburst* because those decisions concerned the retroactivity of this Court's decisions on matters of federal constitutional law, not the retroactivity of a state court's decision on a matter of state constitutional law. *See Harper*, 113 S. Ct. at 2513 (concerning retroactivity of this Court's decision that state scheme taxing federal retirement benefits violated federal constitutional doctrine of intergovernmental tax immunity); *Beam*, 501 U.S. at 532 (deciding retroactivity of this Court's decision that state tax statute violated Commerce Clause); *Griffith*, 479 U.S. at 316 (determining retroactivity of this Court's decision that prosecution's use of peremptory challenges to strike jurors based on race constituted racial discrimination in violation of the Fourteenth Amendment); *see also Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1747 (1995) (regarding retroactivity of this Court's decision that Ohio "tolling" provision was unconstitutional under

---

recognized the court's selective prospectivity ruling demonstrated the court appreciated the nature of its decision on the merits, the prior reliance interests that would be jeopardized by retroactive application, and the equities of the situation.

Commerce Clause). Therefore, these decisions are not directly applicable to the issue of a state court's authority to limit the retroactive application of interpretations of state law, the issue here and in *Sunburst*.

Second, to the extent the decisions upon which Petitioner relies even mentioned *Sunburst*, the decisions did not reject the reasoning or result of that case. *See, e.g., Harper*, 113 S. Ct. at 2519 ("The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. *Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law*, see *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-366 . . . (1932), cannot extend to their interpretations of federal law.") (emphasis added); *Beam*, 501 U.S. at 535 (opinion of Souter, J.) ("Subject to possible constitutional thresholds, see *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990), the remedial inquiry is one governed by state law, at least where the case originates in state court.").[3]

---

[3] In *McKesson* the Court held that when a state tax is found to violate the Federal Constitution, the Due Process Clause of the Fourteenth Amendment "obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." 496 U.S. at 31 (footnote omitted). The Due Process concerns raised in *McKesson* are not present in this case, however, because this case involves no "unconstitutional deprivation" under the Federal Constitution. The decision below and the *Bulman* decision were grounded entirely on the North Dakota Supreme Court's interpretation of the North Dakota Constitution and state common law, not the U.S. Constitution.

Third, these recent federal retroactivity decisions were not based on the Equal Protection, Due Process, or Privileges and Immunities Clauses of the Fifth or Fourteenth Amendment to the United States Constitution, but, rather, on "juristic philosophy," "conceptions of the law," or federal constitutional restrictions on the federal judiciary.

For example, Petitioner erroneously argues that the Court's decision in *Griffith*, concerning retroactivity of federal constitutional decisions in criminal cases, was based on the Equal Protection Clause of the U.S. Constitution. (Petition at 9.) However, the prospectivity analysis in the *Griffith* decision does not even mention the Equal Protection Clause. *See* 479 U.S. at 320-28. Instead, the Court held that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication," *id.* at 322, on two grounds, *id.* at 322-23: First, the Court found "the nature of judicial review" under U.S. Const. art. III, § 2, precluded the Court from exercising the prerogative to make rules of law retroactive or prospective as the Court saw fit, *id.* at 322-23, and, second, the Court cited

---

Also, the prospective application of the *Bulman* decision did not "deprive" Petitioner of any pre-existing right. *See* Petition at 13 ("The issue here is whether [the court] may change the law and then *grant rights and privileges* that flow from that change to some but not to all others similarly situated." (emphasis added)). Under state law no tort cause of action against the State existed until the North Dakota Supreme Court abolished sovereign immunity in *Bulman*. For these reasons, the Due Process Clause concerns expressed in *McKesson* are not relevant here.

the "inequity" of not "treating similarly situated defendants the same," *id.* at 323. *See also Harper,* 113 S. Ct. at 2516.

The other recent federal retroactivity cases also were not grounded on the Fifth or Fourteenth Amendment. In *Beam* Justice Souter's opinion was based on "an issue of choice of law." *Beam,* 501 U.S. at 544 (opinion of Souter, J.). Justice White's concurrence in *Beam* considered several factors, including the *Griffith* decision, but not the Fifth or Fourteenth Amendment. *See* 501 U.S. at 544-47 (White, J., concurring in judgment). Justice Blackmun's *Beam* opinion was grounded on the view that "failure to apply a newly declared constitutional rule to cases pending on direct review violates basic norms of constitutional adjudication," as discussed in *Griffith. Id.* at 547 (Blackmun, J., concurring in judgment). The core of Justice Scalia's concurrence was the view that the Constitution restricts the federal judiciary's authority to "make new law." *Id.* at 548-49 (Scalia, J., concurring in judgment).

In *Harper* the Court held that its decision was controlled by *Beam* and that "[a]lthough [*Beam*] did not produce a unified opinion for the Court, a majority of Justices agreed that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." 113 S. Ct. at 2517. Again, the Court did not state or even imply that this result was compelled by the Fifth or Fourteenth Amendment.

Therefore, no Supreme Court decision has called into question the constitutionality of state courts' exercise of their authority to establish their own common law with

regard to retroactivity of state law decisions. The North Dakota Supreme Court's prospectivity ruling in *Bulman*, as applied in the decision below, does not conflict with the holding of any Supreme Court case. The decision below does not present an important federal question that has not been, but should be, settled by this Court.

2. The decision below does not decide an important federal question in a manner that conflicts with a decision of another state court of last resort or of a United States court of appeals.

As discussed above, this case involves a question of state law and no important federal question is presented here. In addition, the relevant decision below does not conflict with any decision of a state court of last resort or of a United States court of appeals. Indeed, the undersigned counsel has been unable to locate any state or federal case holding that *Griffith*, *Beam*, or *Harper*, or the Fifth or Fourteenth Amendment to the United States Constitution prohibits full or limited prospective application of a state judicial decision concerning a question of state law.

To the contrary, state courts that have considered the issue since issuance of *Harper* or *Beam* have consistently held that state courts may establish their own law with regard to retroactivity and need not follow this Court's federal retroactivity analysis in deciding state law questions. *See, e.g., Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 112 & n.7 (Colo. 1992); *Montells v. Haynes*, 627 A.2d 654, 661 (N.J. 1993); *Beavers v. Johnson Controls World Servs., Inc.*, 881 P.2d 1376, 1380-82 (N.M. 1994); *City of New*

Bern v. New Bern-Craven County Bd. of Educ., 450 S.E.2d 735, 743 (N.C. 1994); *Carrollton-Farmers Branch Ind. Sch. Dist. v. Edgewood Ind. Sch. Dist.*, 826 S.W.2d 489, 515-19 & n.33 (Tex. 1992); *Kennecott Corp. v. State Tax Comm'n*, 862 P.2d 1348, 1349-52 (Utah 1993) (also holding selective prospectivity does not violate the Due Process Clause, *id.* at 1353); *Kincaid v. Mangum*, 432 S.E.2d 74, 83-86 & n.14 (W. Va. 1993).

Since *Harper* and *Beam* many other state courts have continued to apply their own retroactivity/prospectivity tests in deciding whether to limit the retroactive application of decisions on state law questions without even questioning the application of *Harper*, *Beam*, or the Fifth or Fourteenth Amendment to this issue. *See, e.g., Hickel v. Halford*, 872 P.2d 171, 183-85 (Alaska 1994); *Wilderness World, Inc. v. Department of Revenue*, 895 P.2d 108, 113 (Ariz. 1995); *Howard v. Thrifty Drug and Discount Stores*, 895 P.2d 469, 476 n.3 (Cal. 1995); *Stoltz Management Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1210-12 (Del. 1992); *City of Miami v. Bell*, 634 So.2d 163, 165-66 (Fla.), *cert. denied*, 115 S. Ct. 316 (1994); *Fager v. Hundt*, 610 N.E.2d 246, 252-53 (Ind. 1993); *Jones v. Hansen*, 867 P.2d 303, 311 (Kan. 1994); *Oliver v. Schultz*, 885 S.W.2d 699, 702 (Ky. 1994); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657-58 (Md. 1992); *Robinson v. Stewart*, 655 So.2d 866, 868 (Miss. 1995); *Brockie v. Omo Constr., Inc.*, 887 P.2d 167, 171 (Mont. 1994); *King v. Cuomo*, 613 N.E.2d 950, 954-55 (N.Y. 1993); *Landmark Medical Center v. Gauthier*, 635 A.2d 1145, 1152-54 (R.I. 1994); *Hardaway v. County of Lexington*, 443 S.E.2d 569, 570-71 (S.C. 1994); *Larsen v. Sioux Falls Sch. Dist. No. 49-5*, 509 N.W.2d 703, 705-09 (S.D. 1993); *Vermont Acc. Ins. Co. v. Howland*, 648 A.2d 819, 820 (Vt. 1993); *City*

of Richmond v. Blaylock, 440 S.E.2d 598, 598-99 (Va. 1994); *A.B.C.G. Enterprises, Inc. v. First Bank Southeast, N.A.*, 515 N.W.2d 904, 911 (Wis. 1994); *Clarke v. Beckwith*, 858 P.2d 293, 296 (Wyo. 1993).

There is no conflict among state and federal courts concerning state courts' authority to establish their own common law with regard to retroactivity of state court decisions on matters of state law.

There is, therefore, no substantial federal question as to whether a state court decision that a change in state law will be prospective for all parties other than those immediately before the court violates "the Equal Protection and Privilege's Immunities [sic] Clauses of the Fourteenth Amendment to the Constitution of the United States and the Due Process Clause of the Fifth and Fourteenth Amendments" (Petition at i).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LAURIE J. LOVELAND
Solicitor General
Office of Attorney General
900 E. Boulevard
Bismarck, ND 58505-0041
(701) 328-3640
Counsel for Respondent

Date October 9, 1995